

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE NORTHERN DISTRICT OF OKLAHOMA
 3

4 STATE OF OKLAHOMA, ex rel,)
 5 W.A. DREW EDMONDSON, in his)
 6 capacity as ATTORNEY GENERAL)
 7 OF THE STATE OF OKLAHOMA,)
 8 et al.)
 9 Plaintiffs,)
 10 V.) No. 05-CV-329-GKF-SAJ
 11 TYSON FOODS, INC., et al.,)
 12 Defendants.)
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12 TRANSCRIPT OF PROCEEDINGS

13 JUNE 15, 2007

14 MOTIONS HEARING

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 17 BEFORE THE HONORABLE GREGORY K. FRIZZELL, Judge
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19 APPEARANCES:

20 For the Plaintiffs: Mr. Louis W. Bullock
 21 Mr. M. David Riggs
 22 Mr. Richard T. Garren
 23 Mr. Frederick C. Baker
 24 Mr. W.A. Drew Edmondson
 25 Ms. Kelly S. Burch
 Mr. Robert A. Nance
 Mr. J. Trevor Hammons
 Ms. Ingrid Moll

For the Defendants: Mr. Robert W. George
 Mr. Jay T. Jorgensen

1 (APPEARANCES CONTINUED)

2 For the Defendants: Mr. Stephen L. Jantzen
3 Mr. Michael R. Bond
4 Mr. John R. Elrod
5 Mr. A. Scott McDaniel
6 Ms. Nicole M. Longwell
7 Mr. Phillip D. Hixon
8 Ms. Theresa Noble Hill
9 Mr. Robert P. Redemann
10 Mr. Robert E. Sanders
11 Mr. Bruce Jones
12 Mr. Paul Thompson, Jr.

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14 PROCEEDINGS

15 June 15, 2007

16 THE COURT: Be seated, please.

17 THE CLERK: Call case number 05-CV-329-GKF, Attorney
18 General for State of Oklahoma vs. Tyson Foods. Continued
19 motion hearing.

20 THE COURT: What I would like to do on number 66 is
21 also wrap up the aspect that we had discussed at the earlier
22 hearing, specifically the argument that Tyson withdrew as to
23 Clean Water Act preemption. And have we discussed on both
24 sides, has everybody been given an opportunity to reply to
25 that?

MR. MCDANIEL: I would like to have an opportunity to
respond to Mr. Baker's comments of yesterday, Your Honor.

THE COURT: All right, go ahead.

MR. MCDANIEL: Thank you. Good morning Your Honor.

THE COURT: Mr. McDaniel, good morning.

1 critical to know you can have -- you can state a CERCLA claim,
2 you can have a CERCLA claim, a valid one, you can proceed all
3 the way to judgment and recover your natural resource damages
4 as the trustee without the EPA's involvement, without the
5 particular site, the particular facility being on what's called
6 the national priority list, sometimes called the Superfund
7 list. So you don't need EPA involvement. So the question then
8 I think that was -- if I'm not misunderstanding in your mind
9 is, well, what about the situation where one landowner floods
10 another. Let me start with --

11 THE COURT: I never practiced that area of the law, so
12 it may not have any application. I guess more to the point
13 here is that most of these preemption cases arise in the
14 context of where there is EPA involvement and it makes it easy.

15 MR. JORGENSEN: Right.

16 THE COURT: And I don't have that simplicity here.

17 MR. JORGENSEN: Right, that's right.

18 THE COURT: EPA is not involved.

19 MR. JORGENSEN: That's right.

20 THE COURT: So then when I have a serious question in
21 my mind and obviously in Judge Joyner's mind because his order
22 which I have right here beside me said that he --

23 MR. JORGENSEN: I recall.

24 THE COURT: -- he doesn't reach that more substantive
25 issue of whether or not a facility consisting of a million

1 acres is contemplated by the statute. When I've got a serious
2 question as to whether or not CERCLA even applies in this
3 situation, it seems to me as a matter of law and perhaps even
4 more importantly of fundamental fairness, if they don't have
5 the requisite components for a CERCLA action -- I mean, ERISA
6 is easier. I mean, we all know ERISA preempts everything. But
7 when it comes to CERCLA, and particularly when the EPA is not
8 involved, let's say the plaintiffs are wrong, CERCLA just
9 doesn't apply here. And I haven't heard any arguments about it
10 but the issue jumps out at me. And let's say the Court were to
11 decide later on that CERCLA has no application. Isn't it
12 pre -- a little premature for the Court to determine your
13 motion for judgment on the pleadings? That's, that's the best
14 I can boil it down.

15 MR. JORGENSEN: I appreciate you boiling it down
16 because I think this is perhaps the issue on which we will
17 discuss today, on which we will join issue because it probably
18 dictates the result today. And I think I know the answer, let
19 me walk you through what I think the answer is and we can talk
20 about why. So we've been through the cases that say your
21 analysis comes initially on the pleadings. I think the State
22 will stand up and concede that a valid CERCLA claim can be --
23 that the State of Oklahoma is for the natural resources of
24 Oklahoma, the valid CERCLA trustee. That therefore they have
25 standing to pursue a CERCLA claim as to natural resources held